

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EB05RB-63145**

Preston Jones,)
)
 Complainant,)
)
 v.)
)
 Thumann's Inc.,)
)
 Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On July 6, 2012, Preston Jones (Complainant) filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that Thumann's Inc., (Respondent or Thumann's) discriminated against him based on race in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Thumann's denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Thumans is a meat processing company with a facility in Carlstadt, New Jersey. Complainant, a member of the United Food & Commercial Workers Local Union 1245 (UFCW or the union), was hired by Respondent as a warehouse shipping helper on June 4, 2012. In its March 5, 2013 response to the DCR complaint, Respondent asserted that Jones was laid off at the end of his trial period because the company "experienced a severe drop-off in sales." Specifically, Respondent's plant manager, Bill Merkent, wrote that he hired Complainant "[a]s a favor to Local Union 1245," and then laid him off on June 27, 2012 "because business was slow."

Complainant, who is Black, alleged that he was discharged based on his race, because he was the only employee laid off and Thumann's hired a new employee after his layoff. Thumann's agreed that it hired new employees soon after laying Complainant off, but presented a reason unrelated to race for doing so.

Merkent told DCR that Complainant's union status was a factor in the decision to lay him off rather than make him a permanent employee. As an existing union member, Complainant was hired under a 30-day trial period pursuant to the union collective bargaining agreement.. If Thumann's retained him beyond that 30-day period, the union contract would automatically grant him permanent status with full benefits and union protections. Merkent said that as they were nearing the end of the trial period, he decided to lay Complainant off because sales were too low to warrant hiring a permanent, union-protected employee.

Merkent told DCR that he was solely responsible for hiring and layoff decisions. In an August 8, 2013 letter to DCR, Merkent wrote, "... as sales dip I terminate probationary union employees. At the same time I will hire temporary summer help." The union contract permits Thumann's to hire short-term replacements during the summer vacation season, by exempting people hired for the months of June, July and August from coverage under the union contract for 90 days. See, UFCW contract, Article 2(B). Merkent stated that people hired as summer help are usually relatives of permanent workers. DCR's investigation showed that Thumann's hired twelve people as summer help in 2012; none were Black.

Merkent told DCR that due to low product sales during the summer of 2012, his objective was to avoid hiring any new permanent employees with union benefits and protections. Article 3 of the UFCW contract establishes trial periods for new employees, and provides that after completing the applicable trial period, an employee is credited with seniority retroactive to his or her hire date, and "shall not be discharged except for just cause." For current union members, the trial period is 30 days; for other new hires (those who are "new to the industry"), the trial period is 90 days. At DCR's fact-finding conference, Merkent said that Complainant had no disciplinary problems, and he would have retained him if Respondent had sufficient sales to support another permanent employee. He also said that when laying off union members, he is required to lay off the last person hired, regardless of unit or department.

Respondent provided DCR with a list of new hires from January 1, 2011 to March 2013. Eighteen people were hired in 2011 (including summer help). Only one was Black; he worked there less than a month: from February 8 until February 25. No other Black employees were hired until June 2012. In 2012, Respondent hired 33 people, including summer help. Only three were Black: Complainant and [REDACTED] were hired in June and [REDACTED] was hired in September. None of the three were transitioned into permanent positions. Complainant and [REDACTED] were laid off, and [REDACTED] resigned before the end of his trial period. Excluding summer help, Respondent hired 21 employees in 2012: three Black employees (Complainant, [REDACTED]), four white employees, and fourteen Hispanic employees. At least six of these non-Black employees were retained beyond their trial periods and became permanent union employees: four Hispanic people ([REDACTED]) and two white people ([REDACTED]).

In a June 18, 2013 letter to the DCR investigator, Merkent wrote: "The relationship between tonnage and hiring is elementary. The less pounds we sell the less full time union employees we need." Respondent's sales reports for the relevant period show monthly poundage sales of 1,491,597 for June 2012, 369,241 in weekly poundage sales for the week ending June 22, 2012 and 439,430 in weekly poundage sales for the week ending June 29, 2012.

Merkent hired [REDACTED] on June 25, 2012, two days before Complainant was laid off, and he stayed on for almost two years, until May 6, 2014. Respondent's documents show that he worked for Thumann's as temporary summer help the previous summer (June 27 through August 26, 2011), but Respondent identified his June 2012 hiring as "re-hire" rather than "summer help." He was not a union member when hired in 2012, and after the 90-day trial period he was eligible for union membership and permanent status on or about September 23, 2012. The weekly sales for the week ending September 21, 2012 were 321,849, the weekly sales for the week ending

September 28, 2012 were 325,978, and the monthly sales for September 2012 were 1,310,880. Each of these figures is lower than the weekly and monthly sales figures at the time of Complainant's layoff.

As noted above, Complainant was laid off on June 27, 2012. Merkent told DCR that he considers the difference between the current and prior years' monthly sales in making layoff/retention decisions. He said that sales had been declining for the past five years. Comparing the sales figures for 2007 (which showed the highest June and September sales for the years provided) with sales for the same months in 2012, sales declined each year. The decline between September 2007 and September 2012 was 461,520 and the decline between June 2007 and June 2012, when Complainant was laid off, was less drastic: a decline of only 444,165. The June 2012 sales were 122,089 less than the June 2011 sales; the decline in sales between September 2011 and September 2012 was 74,338. Respondent did not explain why this small difference was enough to retain [REDACTED]

According to records supplied by Respondent, it hired [REDACTED], who is white, as a Helper in Shipping—the same position held by Complainant—on June 29, 2012, two days after Complainant was laid off. [REDACTED] worked in this position until July 31, 2012, when he resigned.

The only other Black employees hired in 2012 were [REDACTED]. [REDACTED] was hired on June 18, 2012, as a non-union member, and Respondent's records show that he resigned on July 5, 2012. Because Respondent never reached a decision as to whether to retain [REDACTED] at the end of his trial period, the sales figures at the time his employment ended provide no relevant information.

[REDACTED] was hired on September 19, 2012. According to Respondent's documents, [REDACTED] was not a union member. As a result, Respondent could provide him with a 90-day trial period before he would get any union protections. However, handwritten notations on his job application state "strict trial period 1 wk +." He was laid off on October 12, 2012, the stated reason was "lack of work." Respondent's weekly poundage sales as of October 12, 2012, were 347,462 pounds. Comparing the weekly poundage sales to the sales for the same week the previous year shows an increase. Despite that increase, Merkent laid [REDACTED] off due to "lack of work."

[REDACTED], who is Hispanic, was hired on July 12, 2012, 15 days after Complainant's layoff. Because [REDACTED] was a union member, he was placed on a 30-day trial period that ended on August 12, 2012. At the end of that period, he was retained as a permanent employee. For the week ending August 10, 2012, Respondent's poundage sales were 368,458, which was 783 less than the most recent weekly sales figure at the time of Complainant's layoff, 369,241. The most recent monthly sales figures at the time Merkent made the decision to retain [REDACTED] were for July 2012; the monthly sales for July 2012 were 1,379,886, which was lower than the monthly sales for June 2012. Comparing the cumulative sales for those two weeks in August 2012 to prior years shows a small increase from 2011, but a decline when compared to all other years from the high-sales year of 2007.

On August 7, 2012, Respondent hired [REDACTED], a Hispanic male who was not a union member, on a 90-day trial period. [REDACTED] trial period ended November 5, 2012, and he was

retained as a permanent employee. The poundage sales for the week ending November 2, 2012 were 346,333, which is 22,908 less than the most recent weekly sales figure at the time of Complainant's layoff: 369,241. The monthly sales for the most recent full month at that time, October 2012, were 1,305,296, which is less than the monthly sales figure for June 2012. Comparing the monthly and weekly sales to prior years shows a decline in both the weekly and monthly sales over prior years.

On August 13, 2012, Merkent hired [REDACTED], who is Hispanic, under a 90-day trial period, which ended November 11, 2012. Respondent's weekly poundage sales at the end of [REDACTED] trial period were 329,697 as compared to 439,430 at the time of Complainant's lay off. And the weekly poundage for that week was the lowest of all years going back to 2007. [REDACTED] was transitioned into permanent employment.

At the fact-finding conference held on March 5, 2013, Merkent said that sales were down for January and February 2013, and that he was "down over a hundred thousand pounds" for February. However, a union member hired on January 3, 2013, [REDACTED], who is Hispanic, was retained beyond his 30-day trial period.

ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." *Ibid.* If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); *R.* 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." *Frank v. Ivy Club*, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." *Ibid.*

The LAD makes it unlawful for any employer to discriminate against employees based on race. N.J.S.A. 10:5-12a. Here, the investigation disclosed sufficient evidence to support a reasonable suspicion that Merkent, who had exclusive authority to make hiring decisions, gave preferential treatment to white and Hispanic employees over Black employees when considering whether to retain them as permanent employees. Merkent contended that Complainant and another Black employee were denied permanent employment due to low product sales at the time they were eligible for permanent status. But Respondent's records revealed that this explanation was pretextual: product sales when some white and Hispanic employees were selected for permanent employment were lower than product sales when Complainant and the other Black employee were

laid off. And comparing monthly or weekly product sales with those of similar months in prior years also did not show a comparable or significant decrease in sales. Further, despite saying that there were insufficient sales to justify hiring Complainant into a permanent position at the time of his layoff, Respondent hired a white employee two days before Complainant's layoff and another white employee two days after the layoff.

Respondent also contended that Complainant's status as a union member was the determinative factor in terminating his employment, asserting that sales at the end of his probationary period were too low to support transitioning him into a permanent union-protected position. However, the sales figures at the end of the probationary periods for white and Hispanic employees who were transitioned into permanent employment did not show consistently better sales, whether comparing the same month over the years or the weekly or monthly sales at the time each probationary period ended. During DCR's investigation, Respondent was given repeated opportunities to more specifically explain its decisionmaking process regarding the level of sales that would support hiring or discharge, but did not provide sufficient evidence to eliminate race as a factor in the decision.

The lack of consistency provides evidence that Merkent exercised discretion in determining whether current sales were sufficient to support hiring a permanent employee at the end of each employee's probationary period. While such discretion may be based to some extent on Merkent's expertise, in the context of this case the evidence provides "a reasonable ground of suspicion" that race may have been a motivating factor in exercising that discretion. At the time the complaint was filed, Respondent employed almost no Black employees. The few Black employees hired were not given permanent positions. And by hiring mostly relatives of current employees as "summer help" and then transitioning those temporary employees into permanent positions, the opportunities for Black employees may have been foreclosed.

Based on the above, the Director is satisfied at this threshold stage of the process that the evidence supports a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Accordingly, the Director finds probable cause exists to support Complainant's allegations of race discrimination.



Date: July 22, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights

